Norafizal bin Japperi v Asian Supply Base Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–913 OF 2008
PRASAD ABRAHAM JC
22 FEBRUARY 2010

Labour Law — Employment — Temporary employment — Employment nullified with promise of new letter of appointment — Whether appointment under contract of service or contract for service — Whether payment due for consultancy service

The defendant entered into a contract with the Oil and Natural Gas Corporation Ltd India, for the construction of 'Best-in-class services to upgrade and modernise the Nhava Supply Base'. As the said project was delayed, the plaintiff, who possessed the expertise for the planning and construction of 'Supply Base' for the use of the Oil and Gas Industry, was appointed by the defendant for the said project as a 'Supply Base Planner'. The plaintiff was to charge a consultancy fee for the work done. The plaintiff immediately commenced work in respect of his consultancy. However, the defendant appointed the plaintiff as a temporary project manager with a salary. Soon thereafter, the appointment was nullified with a promise that a new letter of appointment would follow. The plaintiff subsequently issued an invoice for work done which formed the basis of the plaintiff's claim. The crux of the defence was that the plaintiff was appointed as a project manager with the status of an employee on temporary basis and not a consultant. The issue raised was whether the plaintiff rendered services for the said project as a temporary employee or a consultant and whether payment was due to the plaintiff for the consultancy service rendered.

Held, dismissing the plaintiff's claim with costs:

(1) A proper reading of the letter of appointment clearly pointed to a contract for services. There appeared to be no direct termination clause in the said letter and the evidence suggested lack of power by the defendant to control how the work was to be done and the manner in which it was to be done. All these factors point to the relationship between the plaintiff and the defendant being one of contract for services ie consultancy services (see para 11).

(2) There was no evidence led by the plaintiff to support the basis how the figure in the invoice was reached. The plaintiff failed to establish its claim for damage as no credible evidence had been led to prove these damages (see para 13).

[Bahasa Malaysia summary

Defendan menandatangani kontrak dengan Oil and Natural Gas Corporation Ltd India, bagi pembinaan 'Best-in-class services to upgrade and modernise the Nhava Supply Base'. Disebabkan kelewatan, projek tersebut plaintif yang mempunyai kepakaran dalam perancangan dan pembinaan 'Supply Base' untuk kegunaan industri minyak dan gas, dilantik oleh defendan untuk projek tersebut sebagai 'Supply Base Planner'. Plaintif seharusnya mengenakan yuran pakar runding bagi kerja-kerja yang telah siap. Walau bagaimanapun, defendan melantik plaintif sebagai pengurus projek sementara bergaji. Sejurus selepas itu, pelantikan tersebut terbatal dengan janji bahawa suatu surat pelantikan baru akan dikeluarkan. Plaintif kemudiannya mengeluarkan suatu invois bagi kerja yang telah siap yang menjadi asas tuntutan plaintif. Pembelaan pokok adalah bahawa plaintif dilantik sebagai pengurus projek dengan status pekerja sementara dan bukannya pakar runding. Isu yang dibangkitkan ialah sama ada plaintif memberikan khidmatnya ke atas projek tersebut sebagai pekerja sementara atau pakar perunding dan sama ada bayaran terakru kepada plaintif bagi khidmat pakar perunding yang telah diberikannya.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Setelah meneliti surat pelantikan jelas menunjukkan ia merupakan perjanjian untuk perkhidmatan. Tiada klausa penamatan perkhidmatan dalam surat tersebut dan keterangan menunjukkan defendan tiada kuasa untuk mengawal bagaimana kerja-kerja harus dijalankan dan cara ia harus dijalankan. Kesemua faktor ini menunjukkan hubungan antara plaintif dan defendan adalah merupakan perjanjian untuk perkhidmatan iaitu khidmat pakar perunding (lihat perenggan 11).

(2) Tiada keterangan dikemukakan oleh plaintif untuk menyokong asas bagaimana jumlah dalam invois tersebut diperoleh. Plaintif gagal membuktikan tuntutan ganti ruginya kerana tiada keterangan yang boleh dipercayai dikemukakan bagi membuktikan ganti rugi tersebut (lihat perenggan 13).]

Notes

For a case on temporary employment, see 8 *Mallal's Digest* (4th Ed, 2010 Reissue) para 1197.

Cases referred to

Bata Shoe Company (Malaya) Ltd v Employees Provident Fund Board [1967] 1 MLJ 120, HC (refd)

A *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99, FC (refd)
Loy Chin Associates Pte Ltd v Autohouse Trading Pte Ltd [1991] 3 MLJ 291, HC (refd)

Legislation referred to

B Contracts Act 1950 s 71
Evidence Act 1950 s 12

Azwan bin Abdul Wahab (Dzahara with him) (Dzahara & Associate) for the plaintiff.
Rakhbir Singh (Rakhbir Singh & Co) for the defendant.

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Prasad Abraham JC:

D **[1]** This matter was disposed of after a full trial and on 19 January 2010. I dismissed the suit of the plaintiff with costs and I append below my reasons for so doing.

[2] The plaintiff's pleaded case can be set out as follows. The plaintiff E possessed the expertise for the planning and construction of 'Supply Base' for the use of the Oil and Gas Industry. The defendant had entered into a contract with the Oil and Natural Gas Corporation Ltd India (ONGC) for the construction of 'best-in-class services to up gradation and modernization of Nhava Supply Base' hereinafter referred as the said project. As the said F project was delayed the plaintiff was appointed as a 'Supply Base Planner' by the defendant for the said project. The plaintiff was to charge a consultancy fee for his work but the defendant requested that it be paid as a salary of RM6,000 per month to cover the situation that the defendant was being paid consultancy fees on a staggered basis. The plaintiff immediately commenced G work in respect of his consultancy. The defendant issued a letter dated 9 June 2008 posted to the plaintiff wherein, the plaintiff was to be appointed temporary project manager which was subsequently nullified with a promise of a fresh letter being issued. The plaintiff subsequently issued an invoice for work done at 80% stage which forms the basis of the plaintiff's claim.

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[3] The defendant denies the special expertise of the plaintiff. The crux of the defence is that the plaintiff was appointed as a project manager with the status of an employee not a consultant. The defendant mentions that as an employee, the plaintiff has been paid for the months that the plaintiff worked I and the plaintiff's claim is therefore denied. Further the defendant's appointment as an employee was of a temporary nature.

[4] Since this matter was set down to trial on a fast track basis, the issue agreed between the parties was as to whether the plaintiff rendered services for

the said project as a temporary employee or as a consultant.

MATERIAL FACTS

[5] The plaintiff was approached by one Encik Badrul for the defendant, in the light of the plaintiff's expertise in the field especially in relation to his work in the supply base in Kemaman, Terengganu to join the defendant and there after PW1 was taken to meet DW1 on 17 March 2008. At the meeting DW1 explained the said project and a need to appoint the plaintiff. Reference is made to pp 50–51 of the bundle of documents B and for the chronology of work and events, the urgency of the work and the plaintiff getting involved immediately is apparent.

[6] PW1 claims that he subsequently met with the CEO of the defendant to discuss the terms of the plaintiff's appointment. Reference is made to pp 53 and 54 of the bundle of documents B. It is clear that the words used are 'your service' and the actual rate the plaintiff was to be paid had not been agreed upon. There after DW1 began to immerse himself fully with the work and the consultancy services appeared to be proceeding with no problems whatsoever. See *Bahagian* B of the bundle of documents B p 7 onwards.

[7] The defendant in a purported attempt to finalise the arrangements it had with the plaintiff issued a letter addressed to the plaintiff found on pp 61–62 of the bundle of documents B and I have reproduced the letter in full below:

ASIAN SUPPLY BASE SDN BHD

(116635-A)

RANCA-RANCA INDUSTRIAL ESTATE,

P.O.BOX 80751, 87017 LABUAN F.T, MALAYSIA

TEL:(087)411611-614 TELEFAX (087)415477

WEBSITE: www.asiansupplybase.com

Our Ref: ASB/CEO/066/08

09th June 2008

En. Norafizal Bin Japperi

3216-A

Jalan Maktab

Sg. Merab Luar

P.O. Box 47

4365 Bandar Baru Bangi

SELANGOR

Dear Sir

TEMPORARY APPOINTMENT AS PROJECT MANAGER

I am pleased to inform you that the Company has agreed to engage you on temporary basis on month to month as Project Manager to work on its overseas consultancy services projects. Should you agree, then this appointment shall be deemed to take effect from 1st April 2008 when you commenced work with us.

In the initial stage, you will be assigned to work in the Company's current on-going project providing consultancy services to ONGC, India for the upgradation and modernization of their supply base at Nhava in Mumbai, India.

The contract for the consultancy with ONGC is expected to be assigned to the joint venture Company of Asian Supply Base International of which ASB Sdn. Bhd is a partner. When the assignment materializes, most if not all personnel working on the project shall be offered employment in the JV company subject only to final decisions of the Board of Directors of the Company to set the terms of the new employment. Your service with us in this appointment shall cease automatically on the said assignment taking effect.

The following are the terms of this temporary engagement:-

Position

Project Manager.

Salary

RM 6000 all-in per month.

Station

Your will work from the Company's office in Kuala Lumpur located at 7th Floor Menara Dato' Onn, PWTC, Kuala Lumpur or such other location as you may be informed subsequently.

Other terms that ASB may wish to consider inserting in the appointment letter:-

(a) EPF Contributions

(b) Insurance/Group Personal Accident Insurance

(c) Working Hours

(d) Travelling Allowances

(e) Hotel Accommodation

(f) Lodging Allowance

(g) Subsistence Allowance

(h) Other Payments Claimable while on duty

(i) Travel Advance

(j) Mileage Claim

Please indicate your acceptance of this formal offer by giving us a written reply within two weeks. Should you agree to accept, may I congratulate you on the appointment and welcome you to the Company.

Yours sincerely

t.t.

HARRIS HJ ANNUAR TAN

Chief Executive Office

ASIAN SUPPLY BASE SDN BHD

[8] Then in a sudden unexplained turnabout, the defendant issued another letter dated 27 June 2008 treating the aforesaid letter as null and void and promising that a new appointment letter would be forthcoming which never was (see bundle of documents B p 64). PW1 testified in the light of this uncertainty and as a result of PW1 meeting with DW1, an invoice was sent amounting to RM380,000 representing 80% of the work done (see pp 65 and 66 of the bundle of documents B) and the said invoice was issued to the defendant in the name of the plaintiff's company. PW1 further wrote to the defendant on 19 August 2008, setting out the work the plaintiff had done and a polite demand for the settlement of the aforesaid invoice (see pp 67–68 of the bundle of documents B). DW1 meanwhile e-mailed the plaintiff on 22 July 2008. (See p 102 bundle of documents B) and this clearly shows that the defendant wanted continued consultancy services to be done in house to cut costs and that the defendant were only prepared to pay a further RM20,000 to the plaintiff. It is clear from this email that the consultancy services had come to an end subject to a smooth handover.

[9] The court finds looking at all the evidence presented despite whatever language that was used by the parties, *this was a contract for services* and not a contract for service and support for this finding can be found in the following pieces of evidence namely:

(a) The evidence-in-chief of the plaintiff ie answer to Q II PWS1 whilst it was a contract for services, reference to a contract for service was purely to facilitate the fees being paid monthly rather than one lump sum.

(b) Evidence of the exchange of emails clearly show that it was more consonant with it being a contract for service (pp 52, 53 and 54).

(c) It was clear that the plaintiff exercised a fair degree of independence in the provision of his consultancy services.

[10] I refer to *Bata Shoe Company (Malaya) Ltd v Employees Provident Fund Board* [1967] 1 MLJ 120 page 121 of the judgment ie the judgment of Gill J (as he then was):

> The sole question to be decided in this case is whether there is a relationship of employer and employee between the plaintiff company and the salesmen employed by the shop managers to assist them in carrying on the business in the company's retail shops. An 'employee' is defined under s 2 of the Employees Provident Fund Ordinance 1951. As 'any person … who …. is employed under a contract of service … to work for an employer.' The word 'employer' is defined in the same section as a 'person with whom an employee has entered into a contract of service and includes (a) the manager, agent or person responsible for the payment of salaries or wages to an employee'.
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> A contract of service is one in which a person undertakes to serve another and to obey his reasonable orders within the scope and the duty of the undertaking. Whether or not a particular contract is a contract of service is a question of fact, depending upon the terms of the engagement, the method of remuneration, and the power of controlling and dismissing the workmen, although none of these factors is by itself conclusive (see *Halsbury's*, (3rd Ed) Vol 25, p 448, para 872).
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> In *Short v J and W Henderson Ltd* Lord Thankerton recapitulated with approval the four indicia of a contract of service derived by Lord Justice Clerk in *Park v Wilsons and Clyde Coal Co Ltd*. From the authorities referred to by him. These are: (a) the master's power of selection of his servant; (b) the payment of wages or other remuneration; (c) the master's right to control the doing of the work; and (d) the master's right of suspension or dismissal. Lord Justice Clerk had gone on to say that a contract of service may still exist if some at these elements are absent altogether, or present only in an unusual form, and that the principal requirement of a contract of service is the right of the master in some reasonable sense to control the method of doing the work, and that this factor of superintendence and control has frequently been treated as critical and decisive of the legal quality of the relationship.
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> It is to be observed that the relationship of master and servant is characterised by the contract of service, express or implied, between the master and the servant. A contract of service is to be distinguished from a contract for services because a person who contracts to provide services for another person is not a servant but an independent contractor. *To distinguish between an independent contractor and a servant the generally accepted test is whether the employer retains the power, not only of directing what work is to be done, but also of controlling the manner of doing the work. In Stevenson Jordan & Harrison Ltd v Macdonald & Evans Lord Justice Denning said*:
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> > *One feature which seems to run through the instances is that, under a contract of service, a man is employed as part of the business, and his work is done as an integral part of the business; whereas, under a contract for services his work, although done for the business, is not integrated into it but is only accessory to it.*

[11] In our present case, there was an absence of a contract of employment between the plaintiff and the defendant. Secondly it is to be noted that at p 61 of bundle B, the plaintiff was employed to work on the defendant's overseas consultancy service. A proper reading of the letter as a whole clearly points to a contract for services. There appears to be no direct termination clause in the said letter and the evidence suggests lack of power by the defendant to control how the work was to be done and the manner in which it was to be done. All these factors point to the relationship between the plaintiff and the defendant being one of contract for services ie consultancy services.

[12] The consultancy services of the plaintiff was part of the packages of consultancy services to be provided by the defendant in respect of the said project which supports the finding that this was a contract for services.

[13] The consultancy services came to an end when the defendant decided to provide the consultancy *in house*. The next issue to be addressed is the payment due to the plaintiff for consultancy service provided. The plaintiff relies on the invoice that PW1 sent found on pp 65 and 66 bundle of documents B to support the plaintiff's claim. There was no evidence led by the plaintiff to support the basis the figures in the invoice was reached. The original scope of works which included a larger scale fees was not agreed to by the defendant (p 52, bundle of documents B). There was no guide or reference that the court could rely on that would justify the plaintiff's claim. In fact the plaintiff admitted that and no material was produced from the Kemaman Project to show the type of fees claimed by the plaintiff in a similar type of consultancy services. I am of the view that the plaintiff had failed to satisfy the evidential burden set out in s 12 of the Evidence Act 1950 and I quote:

> 12 *In suits for damages facts tending to enable court to determine amount are relevant*
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> In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

[14] Before any award for damages can be made, the party claiming it must prove the fact of damage and the amount of damages per Ong Hock Thye FCJ (as he then was) in *Guan Soon Tin Mining Co v Wong Fook Kum* [1969] 1 MLJ 99 at p 100 (FC):

> The respondent, as the plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving neither fact nor amount of damage *he must lose the action* or, if a right was infringed, he would recover only nominal damages. Where he

succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne and McGregor on Damages* (12th Ed) para 174. For its practical application I would quote Lord Goddard CJ in *Bonham-Carter v Hyde Park Hotel Ltd* [1948] 64 TLR 177 at p 178:

> The plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, 'this is what I have lost: I ask you to give me these damages'. They have to prove it.

[15] Looking at the plaintiff's pleading and in particular the prayers in the statement of claim ie prayer 25 (a) and (b), it was clearly grounded mainly on the sum of RM304,000 as per the plaintiff's invoice and since no credible evidence has been led to prove these damages, the plaintiff had failed to establish its claim for damage.

[16] I find as a fact that the consultancy services rendered by the plaintiff certainly exceeds the amount that the plaintiff was paid as salary. This is borne out by the fact the defendant was prepared to pay a further RM20,000 to the plaintiff (see p 100 of bundle of documents B). However there was no plea by the plaintiff in the alternative for a claim based on quantum merit, or unjust enrichment and or s 71 of the Contracts Act 1950 (see *Loy Chin & Associates Pte Ltd v Autohouse Trading Pte Ltd* [1991] 3 MLJ 291) and as such the matter ends there.

[17] In the light of the aforesaid, based on the pleaded case of the plaintiff, I dismissed the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed